

To:
Defense Mapping
Agency

Headquarters



Office of
The General
Counsel

13 December 1985

GC

STAT

[redacted]
Office of Legislative Liaison
7B14, CIA
Washington, D.C. 20505

Jim:

I enjoyed our phone conversation today and have
enclosed the information that I promised. If you
have any questions, please do not hesitate to
give me a call.


EDWARD J. OBOY
General Counsel

Enclosure a/s

LEGISLATIVE LIAISON
85-3907

ALL FILE Legislation
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LEGAL MEMORANDUM

I. INTRODUCTION

The Department of Defense (DoD), through the Defense Mapping Agency (DMA), exploits foreign sources of Mapping, Charting & Geodesy (MC&G) to satisfy DoD requirements. DMA currently has 185 pure (or sole) executive international agreements with various governmental agencies of 75 countries.^{1/} These agreements generally provide for: (a) the exchange of MC&G data (maps, charts and other information); (b) co-production or joint ventures for co-production and collection of MC&G; (c) no cost loans of DMA MC&G equipment, (e.g. gravimeters, doppler satellite tracking equipment); (d) training, from on-the-job to formal classroom training as, for example that which is provided for by the DMA Inter American Geodetic Survey (IAGS) Cartographic School in Panama;^{2/} (e) access to foreign territory either by DMA or surrogate third countries.

^{1/} A pure executive international agreement is one which derives its authority solely from the U.S. Constitution. See discussion in U.S. Congressional Record, 94th. Cong., 1st. Sess., Vol. 121, no. 152 (October 9, 1975), pp. S17957 - 65; and U.S. Congressional Record, 94th. Cong., 1st. Sess. Vol. 121, no. 170, pps. 20102 - 05; Rovine, Separation of Power and International Executive Agreements, 52 Ind. L.J. 397 (1977).

^{2/} Hearings on H.R. 2121, Military Construction Appropriations Act, 1980 Before the Subcomm. on Military Facilities and Installations of the HASC, 96th. Cong., 1st. Sess. 104 (1979) (Testimony of Perry Fliakas, Deputy Asst. Sec. of Def.).

These activities have resulted in products being provided to DMA estimated to be worth in excess of \$80 million dollars annually.^{3/} These tangible benefits include maps, charts, other publications and reproducible materials, scientific information, and digital (computer usable) data produced in accordance to DMA specifications.

II. DISCUSSION

A. Statement of the Legal Issues

Legal research into the authority to engage in the extensive international program described above reveals that: (1) there is no explicit statutory authorization for the exchange of MC&G products and data particularly for bulk-stocks of maps, charts and digital data. (2) prior law which permitted no-cost loans of DoD /DMA equipment to foreign governments, 10 USC § 2667, was amended in 1981 to prohibit use of that statute in an international context by enactment of the, "International Security and Development Cooperation Act of 1981;"^{4/} (3) the Arms Export Control Act

^{3/} Recent legal analysis within the Department of Defense has raised a question of unlawful augmentation of DoD appropriation in this context. In July 1982, Mr. William Howard Taft IV (then DoD General Counsel) commenting on a U.S. Indonesia Data Exchange Agreement opined that so long as the exchanged data are of "equivalent value" the "...Department of Defense is not providing unreimbursed assistance to a foreign government (thereby violating the Foreign Assistance and Arms Export Control Acts) nor augmenting its appropriations beyond those provided by Congress." He went on to say, "...should the information exchange not be reciprocated the underlying legal basis for the data exchange agreement would be severely cast into question." Informal findings by DoD auditors of DMA exchange agreements with some NATO allies indicate that DMA has been provided tens of millions of dollars of products by them without an equivalent exchange of DMA products.

(AECA)^{5/} and the Foreign Assistance Act (FAA) of 1961^{6/} require foreign governments to reimburse DoD for training whether formal or on-the-job;^{7/} (4) no law authorizes provision of nominal amounts of expendable printing/production supplies on a non-reimbursable basis, (supplies such as ink and paper) to support co-production efforts which result in products being given to DMA.

B. Current Legal Status of these Agreements

It is only arguable that DMA's pure or sole executive agreements are, in and of themselves, sufficient authority upon which to engage in these activities.^{8/} While these agreements may have legal viability where no

4/ P.L. 97-113, "Chapter 6; Leases of Defense Articles", Dec. 29, 1981, codified at 22 USC §2796(c), §2796(a) requires payment for loaning of equipment unless certain conditions exist. An August 1985 memorandum signed by the DoD General Counsel has concluded that the only loans of material which are not subject to the Arms Export Control Act or the Foreign Assistance Act of 1961 "...are those loans which are undertaken as part of a true cooperative research and development project. While a few DMA activities may meet the tests laid out in his memo, most would not.

5/ 22 USC 2751 et seq.

6/ 22 USC 2151 et seq.

7/ In 1983, GAO auditors questioned DMA's authority to provide training for free at the DMAIAGS Cartographic School in Panama. They noted that DMA was the only agency in Latin America not charging tuition. The DMA General Counsel argued in a legal memorandum that 10 U.S.C. §7208 together with Section 709 (i) of the DoD Appropriation Act authorized the practice. The GAO audit was terminated and no report issued. No official reason was given.

8/ The executive agreements entered into by DMA are pursuant to the U.S. Constitution, article II, sections 1, 2 and 3. Congress has been advised in the past of our exchange and co-production arrangements as well as our free tuition policy at the Cartographic School in Panama. Hearings on H.R. 2121,

federal laws has preempted the area, or where they are not inconsistent with legislation in areas where the Congress has authority, however, where Congress has acted all inconsistent provisions are, in effect, repealed. Therefore, the extensive legislation in the area of foreign relations, the Foreign Assistance Act of 1961, and the Arms Export Control Act, have preempted the area and have likely repealed any prior inconsistent provisions in DMA's international agreements (some date back to the 1940's). Additionally any provisions in these agreements which were inconsistent with law existing at the time of their entering into effect are probably void ab-initio since executive agreements cannot supersede prior existing law.^{9/}

 military Construction Appropriations Act, 1980, Before Subcommittee on Military Facilities and Installations of the House armed Services Committee 96th. Cong., 1st. Sess. 626 - 628 (1979) (testimony of RADM Collins, Deputy Director, DMA). See also: Hearings on Military Posture and H.R. 12564, DoD Authorization for Appropriations for Fiscal Year 1975 Before the House Committee on Armed Services, 93rd Cong., 2d Sess. 3654 (1974) (testimony of Lt. General Penney, Director, DMA); DoD Appropriations for 1974: Hearings before a Subcommittee of the House Committee on Appropriations, 93d Cong., 1st. Sess. 719 (1973); and Hearings on DoD Appropriations for Fiscal Year 1976 Before a Subcommittee of the Senate Committee on Appropriations, 94th. Cong., 1st. Sess. (1976) (Statement of Admiral Cramer, Director, DMA). However, whether this authority can also authorize providing (or receiving) materials, unreimbursed training, and loans of equipment in light of the FAA and AECA, is highly questionable. United States v. Capp 204 Fed 655 (4th. Cir. 1953) (Canada and the U.S. entered into an agreement to export potatoes into the U. S. The Court held the executive agreement was void because the executive failed to comply with a specific statute limiting its' power to ban imports).

^{9/} United States v. Capp, 204 Fed. 655 (4th Cir. 1953)(See also FN 1 supra).

III. STATUTORY PROPOSAL

The following amendment to Title 10 is proposed:

"10 USC §2795. Exchange of mapping, charting and geodesy data with foreign nations. The Secretary of Defense may, under such regulations as are deemed appropriate, authorize the Defense Mapping Agency to exchange or furnish mapping, charting and geodetic data (MC&G), supplies or services to a foreign country pursuant to an agreement for the production or exchange of MC&G data."

The proposed statute would provide unambiguous authority authorizing DMA's international program. This law would recognize that the benefits accruing to the U.S. from DMA's international agreements are significant and not in conflict with the purpose of current laws regulating foreign relations, particularly in areas of security assistance. It will provide positive authority to exchange and receive data, loan equipment, train personnel, obtain access to foreign territory, and co-produce MC&G products essential to meet DoD needs.

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99th Congress
1st Session

HOUSE OF REPRESENTATIVES

Report
99-000

[FULL COMMITTEE PRINT]

NOTICE.—This report is given out subject to release when consideration of it has been completed by the full Committee. Please check on such action before release in order to be advised of any changes.

DEPARTMENT OF DEFENSE APPROPRIATION
BILL, 1986

REPORT

OF THE

COMMITTEE ON APPROPRIATIONS

[To accompany H.R. ——]



October 24, 1985.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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51-8790

RESERVE OFFICERS TUITION ASSISTANCE

A new general provision (section 8087) has been added which allows the Department of Defense to provide tuition assistance to Ready Reserve officers who agree to an extended tour of duty upon completion of training. For further details, see the write-up on this subject in the "Guard and Reserve" section of the report.

PROFESSIONAL SURVEYING AND MAPPING SERVICES

A new general provision (section 8088) has been added that directs the Defense Mapping Agency (DMA) to evaluate contractors for professional mapping, charting and geodetic services on the basis of demonstrated competence and qualifications.

This general provision clarifies these professional mapping, charting and geodetic services as Architecture, Engineering and Related Services, requiring the services to be procured in accordance with 10 United States Code 2855 for military agencies and 40 United States Code 541 et. seq., for civilian agencies.

Current law provides for fairness and equity in the distribution of contracts so interested firms, including small businesses, have ample opportunity to compete. This provision does not prejudice existing law with regard to small business participation.

MOST EFFICIENT ORGANIZATION ANALYSIS

A new general provision (section 8089) has been added which directs that a most efficient and cost-effective organization analysis and certification must be completed before a Department of Defense (DoD) function or activity can be contracted out. Functions or activities that would be covered by this new provision are those that are performed by more than 10 DoD civilian employees. It is the Committee's intent that DoD should ensure that it is performing a function in the most efficient and cost effective manner before its costs are compared with those of a contractor.

MAPPING, CHARTING, AND GEODETIC DATA

A new general provision (section 8090) has been added which allows the Department of Defense, under regulations prescribed by the Secretary of Defense, to exchange or furnish mapping, charting, and geodetic data to a foreign country pursuant to an agreement to produce or exchange such data.

TECHNOLOGY PILOT PROGRAM

A new general provision (section 8091) has been added which transfers \$1,000,000 from existing research and development funds to establish a pilot program on advanced semiconductor research at a private non-profit institution. For further details, see the writeup on this subject in the "Research, development, test, and evaluation" section of the report.

NATO COOPERATIVE RESEARCH AND DEVELOPMENT

The 1986 Defense Authorization Act provides that \$200,000,000 of the funds authorized for RDT&E be available for NATO coopera-

or expenses for off-duty training of Ready Reserve commissioned officer personnel, nor for the payment of any part of tuition or expenses for such training of such personnel who do not agree to remain members of the Ready Reserve for at least four years after completion of such training or education.

In connection with "Section 8088":

Sec. 8088. None of the funds appropriated in this Act shall be used for professional surveying and mapping services performed by contract for the Defense Mapping Agency unless those contracts are procured in accordance with the selection procedures outlined pursuant to section 2855 of title 10, United States Code.

In connection with "Section 8089":

Sec. 8089. None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of enactment of this Act, is performed by more than ten Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate.

In connection with "Section 8090":

Sec. 8090. Appropriations available to the Department of Defense during the current fiscal year shall be available, under such regulations as the Secretary of Defense may deem appropriate, to exchange or furnish mapping, charting, and geodetic data, supplies or services to a foreign country pursuant to an agreement for the production or exchange of mapping, charting, and geodetic data.

In connection with "Section 8091":

Sec. 8091. Of the funds made available in title IV of this Act, \$300,000 available for Defense Research Sciences, Army; \$300,000 available for Defense Research Sciences, Navy; \$300,000 available for Defense Research Sciences, Air Force; and \$100,000 available for Defense Research Sciences, Defense Agencies; in all: \$1,000,000, shall be available only for establishing at a private nonprofit institution a pilot program for advanced semiconductor research.

In connection with "Section 8092":

Sec. 8092. None of the funds appropriated by this Act may be obligated or expended for the purposes delineated in section 1103(c) of the Department of Defense Authorization Act, 1986, until 30 calendar days have elapsed following receipt of written notification by the Committees on Appropriations and Armed Services of the House of Representatives and the Senate.

In connection with "Section 8093":

will be out